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THE CHARTER CHALLENGE
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Ontario Justice Education Network
Réseau ontarien d'éducation juridique

CASE SCENARIO
2006

Her Majesty the Queen
(APPLICANT)

v.

J. Intolerant
(RESPONDENT)

Superior Court of Justice

HER MAJESTY THE QUEEN

V.

JOSEPH INTOLERANT

REASONS FOR JUDGMENT

EGALITAS, J.:

1. The accused Joseph Intolerant was tried before me on a charge of wilfully promoting hatred against an identifiable group, contrary to S. 319 (2) (a) of the Criminal Code. The basic facts as I have found them will be set out below.

2. Mr. Intolerant was and is employed by the Yourtown Plastics Factory. He is a dock worker and has held this position for five years. Recently, there has been a change in the cultural make up of the workforce there, specifically a number of Venusians have started working there and apparently been favoured by management. The plant general manager has described these people as good workers and able to do the work

of three ordinary employees. They do not take sick days and have a sterling reputation for integrity.

However, there has been some conflict of late between members of this group and Earthlings who make up the rest of the work force. There has been graffiti sprayed on some areas frequented by the Venusians with slogans such as "go back to your planet" and "Earth for Earthlings". These are some of the milder versions of the comments made.

3. Mr. Intolerant wrote an e-mail to another plant worker, which I set out in full below:

> Dave, I am so sick of those scummy Venusians. They come to this planet and take our jobs, we get the short end of the stick whenever any new groups come in. What about us? We made this country what it is today. Not those newcomers. It is our sweat and blood that made this country. Those politicos in Ottawa welcome all sorts of dirt to this country. It makes my blood boil. If I had my way I would round them all up and deport them. Hell, they are not even people, maybe we should do something more. You know sometimes the Good Lord is looking the other way and who knows who could get hurt. Maybe worse. See you Friday.

4. The person identified as "Dave" was David Goebbels, who is known to police as a member of a white supremacist group. He is in fact the owner and webmaster of a website with the URL scumbagnation.com. I will make a further comment about this below. Mr. Goebbels wrote back to Mr. Intolerant stating

> "Joe, I like the way you think. Maybe the gang at the web should see this"

5. There was no evidence that Mr. Intolerant encouraged Mr. Goebbels to send the e-mail to any web site nor is there any evidence that he discouraged this. Mr. Goebbels

sent the e-mail to his web site, scumbagnation.com. This is a white supremacist organization and has on its site an area where people have posted intolerant speech in various forms.

6. The e-mail between Mr. Intolerant and Mr. Goebbels came to light when Constable Whiteknight, a member of the RCMP anti-hate crimes unit, was conducting random searches of web sites to determine if any were violating provisions of the Criminal Code. In order to find the web site, she simply typed the words "immigrant" and "deportation" into a popular search engine. While some dozens of results were displayed, she was able to find scumbagnation.com with no effort at all. The officer testified that she came across the web site and it displayed a prominent warning:

STOP!! THIS IS A FREE SPEECH ZONE!! MEMBERS ONLY!!!
IF YOU ARE OFFENDED BY HONESTY, LEAVE NOW. IF YOU WANT TRUTH
THEN YOU MUST BE A MEMBER! MEMBERS MUST ENTER THEIR EIGHT
DIGIT SEQUENTIAL ACCESS CODE TO FIND THE TRUTH!
PINKO COMMIE TYPES AND THEIR ILK HAVE NO PLACE HERE!!!

7. Officer Whiteknight indicated that she simply entered the digits 1 to 8 and was allowed immediate access to the site. She described this security system in order to ensure that only members of the web site had access to it as "a total joke" and was

designed to give the appearance of a limited access site, but which was in fact readily accessible to all. I accept this characterization and so find. Thus, any member of the public could have ready access to this site. It was thinly disguised as being restricted to a limited group of people. It was not.

8. The officer then came across the e-mail sent by Mr. Intolerant to Mr. Goebbels, which displayed the names and addresses of both men, in a section marked "What Real Canadians Say". There were a number of similar e-mails posted by anonymous persons, all of which similarly wanted members of minority groups, both visible and otherwise, deported, jailed or physically violated.

9. The Crown has proven beyond any reasonable doubt that the accused man has willfully incited the physical injury of Venusians and hatred against them. They are an identifiable group within the meaning of the Criminal Code. The e-mail was sent to a web site which, while supposedly open only to private members, was in fact open to all as access to it was easily obtained. Therefore, there is no doubt that the accused man has committed the *actus reus* of the offence. It is also my finding that when he sent the e-mail to Mr. Goebbels, he was well aware of Mr. Goebbels' views. He later knew that Mr. Goebbels had sent the e-mail to scumbagnation.com, and did nothing to stop this, or recall the e-mail. Indeed, there is no evidence that he objected to his email being sent to scumbagnation.com . From this, and Mr. Goebbels' statement that "Maybe the gang at the web should see this" I draw the reasonable inference that Mr.

Intolerant was well aware of this web site and by sending the e-mail to Mr. Goebbels intended that it be published or posted on the web site. He was, at minimum, wilfully blind to whether this positing would occur. Thus, there is no doubt in my mind that Mr. Intolerant intended this communication to be made public or knowing that it was likely to be made public deliberately refrained from doing anything to prevent it from being posted in the public domain. He thus had the *mens rea* to commit the offence.

10. However, Mr. Intolerant has raised four constitutional issues in his defence, should I find that the Crown had otherwise proven the case against him. I set them out below:

a) Mr. Intolerant challenged the right of the RCMP to conduct random searches on the internet, especially when the web sites are secured. The Crown counters that Mr. Intolerant has no interest in the web site so he has no standing to launch a challenge.

b) Mr. Intolerant submitted that even if he has no right to challenge the search, then the statement is protected by free speech, which must be broadly construed.

c) Mr. Intolerant further submitted that this e-mail is a legitimate comment on a matter of public importance (immigration policy and employment) and there can be no limits imposed on speech which an accused person claims is

made in a matter of public importance, as long as the accused asserts this is his reason for doing so.

d) Finally, Mr. Intolerant submitted that this was a private conversation and thus not within the scope of the legislation, so he should be acquitted. The Crown counter argues that the need to protect minorities from the promotion of hatred is of such importance that a person can be convicted of promoting hatred if there is any risk that his words will be distributed, no matter what his original intention. The Crown indicates that this interpretation will be a reasonable limit on free speech.

11. I will deal with each argument in turn.

12. The first challenge is to the ability of the RCMP to conduct random searches of the web for evidence of offences. Mr. Intolerant states that to permit this activity to stand means that the RCMP conducted a warrantless search of a web site and that a warrantless search is illegal and thus unreasonable. The results of this search should be excluded from evidence and thus the Crown would have no basis for a prosecution. He asserts that since the evidence found as a result of this search is being used to prosecute him, then he has standing to challenge this search.

13. I reject these arguments. Although I agree that people in this country have the right to constitutional government and that all state agents must uphold and act according

to the constitution, a search is a forceful (in the sense of non-consensual) taking of something from a person by a state agent. It cannot apply to simply seeking information on a website which is available to all. Even if I am wrong in this, Mr. Intolerant had no proprietary interest in this web site and the right to be free from unreasonable search or seizure is a personal right. He simply had no interest in the web site and thus no standing to challenge a search to this site which was the property of another person. If he had an interest in the web site, the result may have been different. However, at trial, Mr. Intolerant was at pains to distance himself from any interest in the web site. He cannot have it both ways. If this was not his web site, then he has no standing to challenge a search of it, even if the evidence found as a result of a search may have devastating consequences for him in a prosecution. The right to constitutional government does not extend to the extent of allowing any person to challenge the right of state actors to enforce the law. Based on this finding, I need not consider whether the admission of this evidence at trial could bring the administration of justice into disrepute.

14. The second argument is that this speech is free speech and is constitutionally protected. I agree that free speech is vital to our democratic society. However, there are limits to this right. It is often said that one does not have the right to yell "fire" in a crowded theatre. Speech which alarms others does not have the same level of protection as speech which is relevant to matters of political or public interest. Speech which promotes hatred against an identifiable group is not deserving of any form of

protection. Thus, I see no basis for a claim that this is free speech. I reject this argument as specious.

15. As well, in making this decision, I note that our constitution requires that it be interpreted in a manner that promotes the multi-cultural mosaic of Canadian society. Thus, minority groups deserve special protection. If speech does not conform to this fundamental principle, it cannot be worthy of protection.

16. I also reject the third argument of the accused. It is not simply sufficient that an accused person assert that his or her speech is relevant to a matter of public importance. Immigration policy is, of course, the subject of legitimate comment. So is the employment situation. However, that cannot be the end of the matter. In order to be a comment on a matter of public importance, it is for the court to find that such a comment was on such a matter. It cannot be sufficient for an accused to simply assert this. Instead, I find that an objective test must be satisfied. If the comment cannot be reasonably seen to be relevant to a matter of public interest, then it is immaterial what an accused asserts or believes. Again, I am compelled to this conclusion by the demands that our constitution and all our laws be interpreted in a manner consistent with the multi-cultural nature of our society. This principle is of super-ordinate importance. I reject the accused's assertion.

17. Finally, the accused argues that even if all other arguments fail, then this was private

speech and he cannot be convicted of any offence. In order to support this argument, it must be established that the conversation between Mr. Intolerant and Mr. Goebbels was intended only for the two of them. For the reasons set out above, I do not accept that this was private conversation. However, I would go further. I agree with the Crown that even if it was the intention of the accused that his conversation go no further than the recipient of it, then the importance of the goal of the equality of all Canadians is of such vital importance that it demands that this section of the Criminal Code be interpreted in a manner that if there was any risk that this communication would go further than the two persons involved, that is sufficient to justify a conviction under this section. In other words, "private conversation" is to be narrowly interpreted in order to give life to the principle of equality. The constitution demands no less and the principle of free speech when it concerns this sort of communication is also to be narrowly interpreted.

18. On this basis, I reject the arguments of the accused and find him guilty as charged. The matter will be remanded for sentencing.

Egalitas, J.